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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, et al.,
Petitioners

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, et al., *Respondents*

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Where petitioners successfully appealed from an adverse jury verdict and obtained a reversal and remand for a new trial, should this Court deny respondents a trial by jury and itself decide questions of fact and law merely because petitioners assert that the trial court may again commit error in the conduct of a new trial.

2. Whether, in an action for treble damages under the Sherman Act, the court below was correct in applying the test of reasonableness in view of the necessity of regulation and the complex economic and marketing facts.

STATEMENT[1]

A. *Tobacco Markets.* A tobacco market consists of a number of public auction warehouses to which farmers deliver their tobacco for auction to buyers such as American Tobacco Company, Liggett & Myers, etc.

B. *Regulation of Tobacco Markets.* Many aspects of the production and marketing of tobacco are subject to detailed governmental regulation at both the state and federal levels. Production is controlled (7 U.S.C.A. § 1311, et seq.); grading standards are maintained (7 U.S.C.A. § 511, et seq.); support prices are established and the Commodity Credit Corporation administers the price support program by means of contracts with public auction warehouses (2 R. 477-8); warehouse commissions and charges are fixed by statute (Ga. Code Ann., Title 111, §§ 301-4).

Finally, the detailed and complicated operation of each local tobacco market is governed by local tobacco boards of trade such as respondent Board. Such boards of trade, among other things, promulgate regulations: (1) governing the entry of new warehouses and allotment of selling time thereto; and (2) the allocation of selling time among existing warehousemen.

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[1] Two appeals have been taken by petitioners to the circuit court, Nos. 16,284 and 17,401. The records in the circuit court will be referred to as 1 R and 2 R, respectively.

C. Need for Allocating Selling Time. The necessity for the allocation of selling time is well settled and is not in issue here.[2] It is however, helpful to understand the reasons for regulation.[3]

1. Tobacco is perishable and must be processed within a short time after purchase.

2. Each tobacco manufacturing company sends one or more buyers to a market. A buyer representing each of the several tobacco companies constitutes a "set of buyers." A set of buyers must be present before a competitive auction can be conducted. If each company sends only one buyer, there is one set of buyers, and the market is termed a "one set market." The number of sets of buyers is not within the control of the local board of trade; it is determined solely by the buying companies. The Douglas market has two sets of buyers and only two simultaneous auction sales may be held.

3. The buyers purchase tobacco at auction at a fixed rate, 400 baskets per hour.

4. The number of hours per day during which buyers may purchase tobacco on a market is fixed at 5½ hours by the Burley Tobacco Association (not a party to this case). This is the normal work day for federal graders. The purpose is to prevent tobacco from

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[2] First opinion below, 244 F. 2d 471, 481; See also *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502, 505 (1959); *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. No. 6262, Initial Decision, December 20, 1955, affirmed by order and opinion of full Commission, August 23, 1956.

[3] These are set forth in detail at 1 R. 85-90 and 244 F. 2d at 473, note 3.

moving too rapidly through the various markets and avoid clogging the processing facilities of the buying companies. When clogging occurs some buyers withdraw from the market because of inability to process purchases. This results in less competitive bidding to the detriment of farmer producers.

At Douglas, each of the two sets of buyers can purchase a maximum of only 2,200 baskets per day (400 baskets per hour times 5½ hours). Thus total market maximum is 4,400 baskets per day, or 11 hours of auction time.

5. Total available selling time is thus fixed by forces wholly beyond the control of respondent Board and must be divided among all warehouses on the market. For example, one warehouse may receive one hour of selling time per day, another 45 minutes, etc. The total, however, cannot exceed 11 hours per day.

Finally, the total amount of tobacco sold on the market as a whole is not and cannot be affected by the number of firms, warehouses or total floor space.

D. *Systems of Allocating Selling Time.* Various methods of apportioning the limited amount of total selling time among individual warehouses have been used on tobacco markets.

1. *Wall to wall system.* If, for example, there are three warehouses on the market, each is assigned a number and lots are drawn. The warehouse getting No. 1 position obtains the first sale when the market opens and is allowed to sell until it runs out of tobacco, which may take several days. The buyers then move

to the warehouse which has drawn No. 2 position and purchase tobacco until there is none left, etc.[4]

2. *Floor space system.* This system was in effect on the Douglas market prior to the change in regulations of which petitioner complains. It is described in detail, together with its adverse economic effects, in *Wilson Tobacco Board of Trade*, FTC Dkt. 6262, supra note 2. See infra pp. 16-17. Pursuant thereto a warehouse is given an amount of selling time on a daily basis determined by the ratio between its square footage and the total for the market. For example, if a warehouse has 100,000 square feet and all warehouses have a total of 1,000,000 square feet, it would receive 10% of the daily selling time. If the market has 11 hours selling time, the warehouse would receive 10% of 11 hours, or 66 minutes per day. Likewise, if one warehouse has 50% of the floor space it would receive 50% of the sales time, and the remaining warehouses would have to divide the other 50%. Under this system there is no way by which a warehouse's basic selling time may be increased from year to year except by the construction of additional space.

3. *Unit system.* Under this system, the available selling time is divided equally among all warehouses on the market. Thus, if there are 10 warehouses each will receive 1/10 of the available time. When this method is used, it is usually provided that a new warehouse will not receive any additional basic selling time

[4] This system has proved undesirable because neither a warehouse nor a farmer knows when a sale will be conducted at a particular warehouse. Under this system it is not necessary to make special provisions for the allocation of selling time to new warehouses. Moreover, it is not possible for a warehouse to increase its selling time from year to year based on its past performance.

for space in excess of the average of all warehouses on the market. This system was adopted by respondent Board and petitioner bases its claim in part upon this change. Under this system, standing alone, there is no provision for increasing or decreasing a warehouse's selling time from year to year. However, by separate regulation this may be accomplished by the "performance" rule which was also adopted by the Douglas Board.

4. *Performance rule.* The basic allotment to each warehouse at the beginning of each year depends on its sales in the preceding year. Thus, if Warehouse A in 1955 sold 10% of the total number of baskets, it would receive a basic allotment of 10% of the selling time for the ensuing year. The performance rule determines only *basic* selling time, not *actual* selling time.

This rule depends for its operation on "free time". "Free time" results when portions of the limited selling time available to the market as a whole are not used by individual warehouses because they do not have sufficient tobacco on their floors. When this occurs other warehouses which need more time to sell all their tobacco obtain additional time. Thus actual selling time available to an individual warehouse consists of its basic allotment plus free time. The patronage of farmers determines actual selling time. The determination of basic selling time for the next year depends on *actual selling time used*, which may be more or less than the basic allotment for the past year. The Douglas regulations provide that the extent to which free time may be credited and unused time deducted in determining the basic allotment for the next year is limited by a 3½%, "gain-or-loss" proviso, which simply means that no warehouse may either lose or

gain more than 3½% of its previous base allotment in any one year. Petitioners base their claim in part upon this "gain-or-loss" proviso.

E. *Proceedings Below.* The ultimate substantive issue in this case is exactly the same as presented in many others: Is the allotment to a newcomer and the method of thereafter determining the selling time of each warehouse on a year-to-year basis reasonable and fair under all the circumstances?

Petitioners claim that merely because they built a warehouse having 36.36% of total market floor space they were automatically entitled to 36.36% of the selling time. This simple but superficial basis for claiming selling time (floor space system) has been held by the Federal Trade Commission to be subversive of principles of free competition.[5]

The trial court found that if petitioners were allotted the 36.36% claimed, they would "obtain four times as much selling time as five of the existing warehouses and twice as much as the existing sixth warehouse" (1-R. 103). Its ultimate holding was:

[5] "Under the floor space system, the only competition was in capital resources. One who could afford it, could build and build, increasing his selling time and, therefore his business, at the expense of those who could not afford to build in retaliation. Obviously, this favored the wealthy—the poor operator would soon be out. This produced an uneconomic waste of capital—and unnecessary and unused warehouse floor space so strikingly demonstrated on the Wilson market from 1939-1952 as hereinafter found. Furthermore, it discourages, if indeed, it does not kill, competition in service, which is all the warehouseman has to sell, and which is therefore, or should be, his sole competitive battlefield. The real control over the market then, is not where it should be the farmer—but where it should not be, financial resources." *In The Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262, Initial Decision, December 20, 1955, p. 22, affirmed by order and opinion, August 23, 1956.

> Defendants were not obligated to allow plaintiff to enter the Douglas market and capture at one stroke, without any sales effort whatsoever, over one-third (36.36%) of the available selling time; they were obligated to allow plaintiffs entry to the market with a reasonable amount of selling time; the 14.28% (i.e., one-seventh) of total available time allowed to plaintiffs, there being seven warehouses including the warehouse of plaintiffs, was reasonable (1 R, 106).

The Circuit court affirmed:

> The most directly pertinent decisions then available by which the Board of Trade might chart its course were those which we have discussed. Under those decisions, we think that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year[6] (244 F. 2d at 481).

However, the circuit court remanded the case for trial with respect to the gain-or-loss proviso, which provided that no warehouse could have an increase or decrease in base selling time of more than 31⅔% of the time allotted for the previous year.

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[6] "There was already a surplus of warehouse floor space on the Douglas market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse." (Footnote by court.) As early as 1950 total warehouse capacity in the flue-cured area "was practically four times market capacity." Reference cited by petitioner (Pet. 19), U.S. Dept. of Agriculture, Marketing Research Report No. 101, Sept. 1955, p. 12.

Following remand the case was tried. Both petitioners and respondents introduced substantial evidence concerning the reasons and effects of the 3½% limitation. The jury returned a verdict for the Board. At trial, petitioners excepted to only *one* of the trial court's jury instructions—an instruction as to interstate commerce (2 R. 610-620).

Petitioner again appealed, relying on seven points (2 R. 621-2), the first four of which dealt solely with the trial court's instructions concerning interstate commerce.[7]

The circuit court again reversed and remanded for a new trial on the ground that the trial court should instruct the jury that as a matter of law sale of tobacco at auction is in interstate commerce (266 F. 2d at 644).

ARGUMENT

I. PETITIONERS MERELY SEEK TO DENY RESPONDENTS TRIAL BY JURY

The real thrust of petitioners' argument is to deprive respondents of a trial by jury and have this Court decide all issues of fact and law and then remand the case for determination of damages only.

The Court below, in remanding for a new trial, stated:

> It is a question for the jury to decide as to whether the 3½ per cent limitation, as construed

[7] Petitioners' fifth point related to the striking of certain testimony, but was abandoned; the sixth claimed prejudicial effect on the jury resulting from undue repetition of plaintiffs' burden of proof. By their seventh point petitioners merely tried to re-open and obtain reconsideration of the holdings of the circuit court on the first appeal that the initial allotment to petitioners of 14.28% was reasonable (2 R. 621-2).

and applied constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act. That is, of course, a mixed question of law and fact, but its resolution, under appropriate instructions, difficult as they may be, must ultimately be left to the jury [citing cases] 266 F. 2d at 643.

But petitioners say:

> They [petitioners] submit, therefore, that they should not be subjected to the expense and inconvenience of another trial . . . (Pet. 20).
>
> * * *
>
> No jury [s]hould be permitted to grant its neighbors dispensation from the commands of the Sherman Act . . . The only question open is the extent to which petitioners have been damaged . . . (Pet. 25).

No jury has granted "dispensation". Petitioners sought a new trial and prevailed. Not content with a successful appeal, they now attempt to build a case for certiorari on the untenable assumption that in a new trial the jury will disregard the law and facts, and that the trial judge will permit this.

Petitioners argue further: ". . . We believe the restraints exposed on this record are unreasonable *per se*, and *too* plain and glaring to present a question of fact for a jury" (Pet. 26). Thus petitioners, in effect, seek a directed verdict from this Court although they did not seek one from the trial court.

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[8] Cf. *Public Service Commission* v. *Brashear Lines*, 306 U. S. 204, 206 (1939).

A. Petitioners Are Foreclosed From Urging a Per Se Rule

Petitioners are foreclosed from now urging the adoption of a *per se* rule by the prior proceedings in this case. They themselves specifically asked the trial court to apply the test of reasonableness, and this was exactly what the court did. Petitioners submitted the following proposed instruction:

> In determining this question you [the jury] may consider the history of the 31½ per cent limitation, the evil believed to exist, the reason why this limitation was adopted and the purpose of the limitation. (2 R. 189).

Petitioners thus stand in the anomalous position of now contending that it was "a disservice to the memory of the author of the *Chicago Board of Trade* opinion" (Pet. 22) for the court below to apply the test of reasonableness whereas they themselves proposed application of the test of reasonableness in language almost identical to the formulation of that test in the *Chicago Board of Trade* opinion, 246 U.S. 231, 238 (1918).

B. The Courts and Federal Trade Commission Are Unanimous in Applying a Test of Reasonableness

All tribunals which have heretofore considered the regulations of tobacco markets governing the allocation of selling time have followed the test of reasonableness in determining legality or illegality. Thus, the Federal Trade Commission in the *Asheville Tobacco Board of Trade* case, Dkt. 6490, said:

> There is no dispute here as to the legality and reasonableness of the "performance" method of

> allocating selling time on the Asheville tobacco market. In fact, the Commission has sustained the intrinsic legality of such a method in a recent proceeding involving another North Carolina tobacco auction market. *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262 (decided Aug. 23, 1956). And the courts have likewise upheld the adoption of the "performance" method of allocating selling time. [Citing, *Day* v. *Asheville Board of Trade*, 242 N.C. 136, 87 S.E. 2d (1955); *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5, 1957)] (Opinion, Feb. 14, 1958, p. 4).

In the *Wilson* case, Docket No. 6262, the Commission said:

> Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system. (Opinion August 23, 1956, p. 5).

The Fourth Circuit, in *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502, 511 (4th Cir. 1959), held that whether a regulation respecting entry is illegal ". . . depends upon the significance of the restraint in relation to the particular [tobacco] market under investigation."

The opinions of the court below are, of course, in full accord with these statements. 244 F. 2d at 478-79; 266 F. 2d at 643.

C. This Case Presents Complex and Disputed Factual Questions

The complex facts and circumstances surrounding the operations of tobacco markets present numerous factual issues.

At trial much detailed evidence was adduced by both petitioners and respondents. This evidence falls in two main categories: (1) actual effects of the 3½% limitation and (2) economic and practical reasons for its adoption in light of the complicated market mechanics and the many other regulations of the market by forces outside the control of respondents.

As to effects, petitioners elicited testimony from two economists concerning actual and potential effects of the 3½% provision upon the operations of the market. (2 R. 428 et seq.; 547 et seq.) Similarly, respondents offered conflicting evidence as to the effects on the market (e.g., 2 R. 468 et seq.), together with the reasons for adoption of the provision (e.g., 2 R. 473-474, 585-587).

Also, petitioners adduced evidence calculated to show that the basic selling time controls to a very substantial degree the actual amount of business a warehouse does (e.g. Pet. 7). Respondents introduced substantial evidence to the contrary showing, for example, that the largest firm on the market with 23.8% of the base selling time sold only 15.9% of the total tobacco, while petitioners sold 19.3% of the total tobacco with a basic allotment of 14.28% (Def. Ex. 26, 2 R 633). Again, petitioners at trial attempted to prove that the market is frequently blocked, i.e., more tobacco is brought to the market in one day than can be sold, and that under such conditions a farmer has no choice

as to the warehouse he will sell with (e.g. Pet. 7), respondent offered contrary evidence (2 R. 504-505, 633-634). Also, petitioners put in evidence from which they purport to "calculate" that it would take petitioners 27 years to obtain 36.36% of the selling time which they claim (Pet. 14-15). Respondents put in evidence to rebut this argument (2 R. 633-634).

On reasons for adoption, petitioners put in evidence from which they argue that the 3½% limit was aimed solely at them. Respondents put in substantial evidence to show the contrary, for example, that the provision affected some of the existing warehousemen as much as or more than petitioners (2 R. 589-590); that such a limitation was reasonable and necessary because of the unique facts concerning the auction system (e.g., 2 R. 468 et seq.). It was this and other evidence which prompted the court below to state on the second appeal:

> The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3½ per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions. 266 F. 2d at 644.[9]

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[9] The Fourth Circuit, in reviewing an extensive record in a Federal Trade Commission proceeding, held that there are "a number of reasons why it may be desirable that there be some limit on the possible gain or loss to an individual warehouse in a single year" and, while the court condemned the particular limit there involved under the particular circumstances, it further held that a "reasonable limitation" would not violate the antitrust laws and that the "order of the Commission does not prevent a reasonable limitation." (263 F. 2d at 511).

The court below, in remanding for a new trial as requested by petitioners, stated: "It is a question for the jury to decide as to whether the 31½ per cent limitation as construed and applied constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act." 266 F. 2d at 643.

The question of construction and actual application of the regulation is at issue. Petitioner belabors the question as to whether the 31½% regulation was actually followed and whether all warehousemen were treated the same (Pet. 10-15). Respondents offered evidence as to the construction and application of the regulation and equality of treatment (e.g., 2 R. 493).

Respondents submit that this Court should not grant the writ and thereby deprive respondents of their right to trial by jury merely because petitioners profess a fear that the jury will give respondents "dispensation" or on the strained afterthought that what *may* be factually found to be unreasonable is somehow "*per se* unreasonable" without submission of all the relevant facts to a jury with proper instructions. Cf. *Southern Power Company* v. *North Carolina Public Service Company*, 263 U.S. 508 (1924).

D. The Court Below Correctly Applied the Test of Reasonableness

Petitioners attempt to present an over-simplified issue. They claim 36.36% of the selling time based upon one simple proposition, namely, petitioners built a warehouse containing 36.36% of total market warehouse floor space. The Board changed the regulations and allotted petitioners 14.28%. This, it is argued, is unreasonable as a matter of law.

But, say petitioners inconsistently, "When entry . . . is permitted on a fair basis, a new rule is not necessarily bad simply for being new" (Pet. 22). It, therefore, does not help petitioners to talk in terms of "unreasonableness *per se*" and attempt to fit their case into the pattern of such cases as *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941), and *International Salt Co.* v. *U. S.*, 332 U.S. 392 (1947) (Pet. 22). The Federal Trade Commission has held that the very basis upon which petitioners claim 36.36 i.e., that they own that much floor space in relation to total floor space, is monopolistic in its tendencies, inimicable to the public interest and particularly the interest of farmers patronizing the market. Thus, in the *Wilson Tobacco* case, where the issue was whether the Wilson Board had acted arbitrarily and unreasonably toward newcomers by discarding the floor space system of allocating selling time; the Commission affirmed the following finding of the hearing examiner:

> Under the floor space system, the only competition was in capital resources. One who could afford it, could build and build, increasing his selling time and, therefore his business, at the expense of those who could not afford to build in retaliation. Obviously, this favored the wealthy—the poor operator would soon be out. * * * Furthermore, it discourages, if indeed, it does not kill, competition in service, which is all the warehouseman has to sell, and which is therefore, or should be, his sole competitive battlefield. The real control over the market then, is not where it should be—the farmer—but where it should not be, financial resources. (*In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. 6262, Initial Decision, p. 22.)

Petitioners complain that in entering the market they relied upon rules which were changed by respondents coincident with their entry. The basic contention is that the Board was legally bound to do nothing and by merely covering acres with a roof petitioners should obtain over one-third of the market. If this be so, any builder with financial resources could capture 70% or 80% of the market with dollars alone and drive out competitors. Without regulation to prevent this, the result is "butting dollar against dollar" by all warehousemen to construct unneeded floor space in an effort to retain selling time with the consequent elimination of smaller operators with less capital.[10]

With respect to the change of rules the circuit court held:

> The allocation of selling time among the local warehouses, as has been shown, was a necessity. So long as they were in unanimous agreement there was no objection to the "Unit Floor-Space System." With the advent of a new and powerful competitor, no agency existed for the necessary allocation of time except the Douglas Board

[10] *In the Matter of Wilson Tobacco Board of Trade*, FTC Dkt. No. 6262. The Department of Agriculture has concluded that their "study has shown that the rules for distributing selling time and other rules limiting the sales have led to increases in facilities" and that "a method such as the present one, which induces the operators to overexpand their facilities, decreases the efficiency and adds unnecessary costs." The Department adds that the answer does not lie in doing away with regulation because this "would lessen competition" and that regulation is "necessary to promote orderly and efficient marketing of the tobacco and competition among the buyers." Reference cited by petitioners, The Auction Marketing of Flue Cured Tobacco: A Preliminary Appraisal, Department of Agriculture, Marketing Research Report No. 101, Sept. 1955, pp. 51-52.

> of Trade. The time within which it had to take action was brief. Construction of the new warehouse began in May. Various, albeit heated, discussions ensued. The warehouse was completed the last of June, and the new by-law adopted the 10th of July, five days before the opening of the 1954 season. *The plaintiffs themselves, by the timing of their project, bear the primary responsibility for the extremely brief period of time within which action by the Board of Trade became necessary* (emphasis added). 244 F. 2d at 471.

Even petitioners, we believe, would not contend that they should be allowed to capture 70% or 80% of the market by merely building. They admit that "a new rule is not necessarily bad simply for being new" and that it is a question of fairness (Pet. 22). It is, indeed, a question of fairness—fairness to the market as a whole and the farmers who patronize it, fairness to petitioners and fairness to existing warehousemen.

And the circuit court held "that it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year." (244 F.2d at 481).

Under all the facts and circumstances and upon the basis of the entire record it is clear that the circuit court's holding was not in error.

II. NO ISSUES OF WIDESPREAD SIGNIFICANCE ARE PRESENTED

This litigation is of little, if any, importance to any market other than Douglas. The reasonableness of regulations must be determined on a case to case basis, and no general rule is possible. There are some 95 markets situated throughout the South, each with its own set of rules. The circumstances surrounding the adoption and operation of particular systems for the allocation of selling time necessarily vary in each case.[11] Thus, in the *Wilson* case the Federal Trade Commission did not question the fairness of an allotment of 11.17% to a newcomer. Under the circumstances disclosed in the *Asheville* case, however, it tentatively held that an allotment of 8.33% was unfair.[12]

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[11] See, e.g., *Day* v. *Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d 18 (1955), performance system together with application of unit system to entrants held valid; *Cooperative Warehouse* v. *Lamberton Tobacco Board of Trade*, 242 N.C. 123, 87 S.E. 2d 25 (1955), regulation permitting the transfer of sales time from one warehouse to another by owner or operator or both held valid as to market on floor space system, although there was an excess of floor space on the market as a whole; *Kinston Tobacco Board of Trade* v. *Liggett & Myers Tobacco Co.*, 235 N.C. 737, 71 S.E. 2d 21 (1952), board of trade cannot require manufacturer to furnish additional buyers; *Bright Belt Warehouse Ass'n* v. *Tobacco Planters Warehouse*, 231 N.C. 142, 56 S.E. 2d 391 (1949), warehouse association lacked authority to prohibit auction sales because of absence of specified number of buyers; *Gray* v. *Central Warehouse Co.*, 181 N.C. 166, 106 S.E. 657 (1921), board of trade not authorized to prohibit nonmembers of board from buying at auction sales; *In the Matter of Wilson Tobacco Board of Trade*, supra, note 2, performance system without limitation held reasonable but entry provision based on time allotted last entrant held unreasonable.

[12] The Commission has recently reopened the *Asheville* case for the reception of further evidence. FTC Dkt. No. 6490, Order, July 20, 1959.

Whether the questioned regulation is unreasonable is a mixed question of law and fact which necessarily must "depend on appreciation of circumstances which admit of different interpretations." See *FTC* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951); *U.S.* v. *Johnston*, 268 U.S. 220, 227 (1925). Thus, the Fourth Circuit held that whether a regulation is reasonable "depends on the significance of the restraint in relation to the particular market under investigation." *Asheville Tobacco Board of Trade* v. *FTC*, 263 F.2d 502, 511 (4th Cir. 1959). Both the FTC and the Fifth Circuit agree.

III. NO CONFLICTING DECISIONS

Petitioner does not point to any conflict among the lower courts as a ground for the granting of the writ. Instead, petitioners belabor what they conceive to be a "shift in positions" of the lower court on the second appeal. Even assuming the validity of petitioners' assertion, it is well settled that a lower court may always review and modify or correct its own decisions. *Messinger* v. *Anderson*, 225 U.S. 436 (1912).

However, a fair reading of the two opinions of the court of appeals fails to disclose any inconsistency. In the second appeal the circuit court devoted the majority of its opinion to the precise question presented, namely, whether the trial court's instructions concerning interstate commerce were correct. After deciding that issue for petitioners, the court stated that its dicta in its first opinion concerning the 3[1]/2% gain or loss proviso should not be permitted to influence the jury's verdict (266 F.2d at 643). The court amplified its earlier dicta on the basis of evidence taken at

trial. Both opinions make it clear, however, that the final determination is for the jury. Finally, obviously anticipating a retrial pursuant to its remand, the circuit court called the trial court's attention to *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959), which was decided after all briefs to the circuit court were filed (266 F. 2d at 644).

Out of this petitioners attempt to create an impression of inconsistency, vacillation and failure of the circuit court properly to discharge its duties. This is unwarranted. In any event, petitioners' entire position is of necessity predicated upon an assumption that upon retrial and possible further review by the circuit court error will be committed.

IV. NO CONFLICT WITH DECISIONS OF THIS COURT

Petitioners repeatedly cite *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959). Petitioners' argument is not clearcut. At one point it appears to be that the circuit court evidences vacillation and inconsistency by clarifying its first opinion in connection with "public interest."[13]

Clarification by a circuit court of a former opinion in the light of a subsequent opinion of this Court hardly satisfies Rule 19(6) of this Court, and especially where there is as yet no final judgment, such clarification being merely dicta.

Elsewhere in their brief, however, petitioners erroneously suggest that the court below has not "fully given effect to the thrust of the *Klor's* holding" (Pet. 26). Significantly, however, at no point do petitioners

[13] The first opinion below was rendered prior to the *Klor's* decision.

contend that the lower court's interlocutory opinion is inconsistent with or contrary to *Klor's*.

Petitioners' justification for seeking a writ boils down to this: Upon remand the trial court *may not* follow *Klor's*, a verdict *may be* rendered against petitioners, petitioners *may have* to seek review in the circuit court, and the circuit court *may not* follow *Klor's*. Therefore, the case should be tried and decided *de novo* by this Court, or at least, say petitioners, "This Court [should] strip off the verbal barnacles that have too long impeded the proper determination of so many Sherman Act cases" (Pet. 26) and render an anticipatory advisory opinion before the entry of any final judgment below, solely on the speculation that the trial court or court of appeals, or both, may misinterpret *Klor's*. Cf. *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944); *Triplett* v. *Lowell*, 297 U.S. 638, 648-9 (1936).

In any event, this suggestion of petitioners is surprising since the circuit court gave full effect to *Klor's*, 266 F. 2d at 644.

Petitioners also argue that, in the after-light of *Klor's*, the trial judge's reasoning was "infected" (Pet. 26), but the record facts resound against them and they are even foreclosed from raising this issue. The trial court, long prior to *Klor's*, gave the jury an instruction on "public interest" almost identical to the charge requested by petitioners:

> *Petitioners' requested charge:* "In other words, you [the jury] are to determine whether the 3[d] limitation tends to prejudice the public interest or whether it did not tend to prejudice the public interest." (2 R. 189).

Court's charge: "I further charge you that in order to carry their burden of proof, the plaintiffs must prove . . . . . Second, that the three and one-half percent limit prejudices or tends to prejudice the public interest." (2 R, 600).

Understandably, petitioners did not except to the above charge or raise any issue with respect thereto on appeal (2 R, 261-2).

The trial court having given the charge requested by petitioners themselves, petitioners cannot now be heard to criticize the trial court, especially where, as here, no issue with respect to "public interest" was raised in the circuit court and the case has been remanded for retrial. See *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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